REASONS FOR DENYING THE WRIT

There exist three independent reasons for denying Petitioner's request for the issuance of the writ of certiorari. Consideration of the Question Presented by Petitioner is inappropriate in light of the record in the case. The Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i)(v), allows the use and the request to disclose social security numbers for tax collection purposes and is not limited by the Privacy Act under the facts of this case. In any event, the purported conflict between the Sixth and Eleventh Circuits is immaterial to the outcome of the case in light of the record and does not present an issue of practical significance to warrant review by this Court.

I. Consideration of the Question Presented by the Petition for a Writ of Certiorari is Inappropriate or will not be Dispositive in Light of the Record in this Case.

Consideration of the Question Presented by Petitioner is inappropriate when viewed in the context of the entire record in this matter. Any decision by this Court as to the Question Presented will not be dispositive in this case. Petitioner cannot pass the threshold standard for recovery under the Privacy Act, even assuming arguendo he was entitled to sue the City under the Act, which as the law stands he does not.

A. Petitioner Admitted He was not Denied a Right or Benefit and Petitioner Failed to Prove, and There is no Evidence, that any Purported Violation of the Privacy Act by the City was Willful or Intentional.

Section 7 of the Privacy Acts bars an agency from denying "any individual, any right, benefit or privilege provided by law because of such individual's refusal to disclose his social

security account number (SSN) to the agency". § 7(a)(1). The City did not inform Petitioner of the purpose for requesting his social security number on the tax forms it requires residents and non-residents to complete who work in the City of Detroit or derive income from business activities in the City.

Plaintiff admitted that he had not been denied any right or privilege by the failure of the City to state the purpose of the request to disclose his social security number (SSN). Schmitt v. Detroit, 267 F.Supp.2d 718 (E.D.Mich. 2003); Pet. Apx. C., p. 22a fn6. The district court correctly held "it is implausible that the City's action adversely affected Plaintiff because he has admitted that the City did not harm him by requesting his social security number." Id. Furthermore, the district court ruled that Petitioner failed to prove that the City acted intentionally or willfully in requesting the SSN in light of the Internal Revenue's Services allowance of the use of SSN for taxpayer identification purposes and that state and local authorities follow that practice. Id.

Therefore, even if Petitioner has an implied cause of action, Plaintiff has not met the statutory criteria for entitlement to damages pursuant to the Privacy Act. Id. The Sixth Circuit Court of Appeals did not reverse the ruling on that issue or address that aspect of the district court's decision. A ruling by the Supreme Court would not have a dispositive effect as Petitioner's claim is barred by failure to meet the statutory criteria for recovery under the Privacy Act. Significantly, the Supreme Court would have to review facts that are outcome determinative and which were not decided by the Sixth Circuit, which makes this case not certworthy. Petitioner cannot prevail even if this Court would grant certiorari in this case.

Even assuming that the City's request for Petitioner's social security number without the 7(b) disclosure requirement violated the Privacy Act, Petitioner still fails to state a cognizable claim against the Respondents. Schmitt is not entitled to recover damages, as any such violation has not been shown to be "intentional or willful" as required under the Act to sustain an award of damages. Schmitt, supra, Pet. Apx. C, p.22a. In order to prove a violation of the Privacy Act, plaintiff must establish (1) a violation of the Privacy Act, (2) the violation was intentional or willful, and (3) the violation had an adverse effect on Plaintiff. Cardamone v. Cohen, 241 F.3d 520 (6th Cir. 2001); Hudson v. Reno, 130 F.3d 1193, 1197 (6th Cir. 1997); Henson v. NASA, 14 F.3d 1143, 1149 (6th Cir. 1994) (plaintiff must prove that the government's actions were intentional or willful); Wiley v. Department of Veteran Affairs, 176 F.Supp. 2d 747 (E.D. Mich. 2001) (must be intentional or willful in a manner beyond gross negligence and agency must disclose information without grounds for believing it to be lawful); Kostyu v. United States, 742 F. Supp. 413, 416 (E.D. Mich. 1990) (culpability under the Privacy Act requires a showing of fault greater than gross negligence); Albright v. United States, 235 U.S. App. D.C. 295;732 F.2d 181, 189 (D.C. Cir. 1984) (intentional or willful standard under the Privacy Act does not encompass all voluntary actions with might otherwise inadvertently contravene one of the Act's strictures).

In the United States Supreme Court decision of Doe v. Chao, 540 U.S. 614, 124 S. Ct. 1204, 157 L.Ed. 2d 1122 (2004) the petitioner's social security number was disseminated to a group of claimants, their employers and others when he placed his SSN on an application form to seek benefits under the Black Lung Benefit Act. The Supreme Court in Doe acknowledged that a Plaintiff must demonstrate

that he was adversely affected by an intentional or willful agency action and prove actual damages to come within the criteria for the Act. Id. at 620-622, 626.

The district court found in the instant case that neither the City nor the individual Defendants intentionally or willfully violated Schmitt's rights under the Privacy Act. Schmitt v. City of Detroit, 297 F. Supp. 2d 718 (E.D.Mich. 2003); Pet. Apx C, p. 22a. Petitioner failed to state a cognizable claim or to allege facts sufficient to support a violation of the Privacy Act. Id. There is no evidence that the City published the social security numbers without grounds for believing such action to be lawful or that it flagrantly disregarded Plaintiff's rights. Id.; Ramero-Vargas v. Shalala, 907 F. Supp. 1128 (N.D. Ohio 1995).

Significantly, requests for taxpayers' social security numbers are mandated by the Internal Revenue Service's use of those numbers for taxpayer identification purposes on federal tax forms and W2 forms. 26 U.S.C. § 6109(d). Therefore, the district court correctly ruled that since the City's practice follows the widespread practice of the IRS and most local and state tax authorities, Plaintiff failed to show that the City acted intentionally or willfully. Schmitt, supra, 297 F. Supp. 2d 718, Pet. Apx. C, p. 22a.

Under these facts, the record simply does not permit the inference that Respondents acted with flagrant disregard for Plaintiff's rights under the Privacy Act, especially in light of the fact that Petitioner admitted the City did not harm him by requesting the SSN. Negligence does not suffice to satisfy the Act's "intentional or willful" standard for an award of damages. Petitioner failed to satisfy the elements to establish a violation under the Privacy Act or to produce evidence of

injuries of the sort that would sustain an award of damages under the Act.

B. Plaintiff Has Not Shown Actual Damage or Injuries to Sustain an Award for Damages or Attorney Fees.

If an agency intentionally or willfully violates the Privacy Act, or any rule promulgated under it, in such a way as to have an adverse effect on an individual, the aggrieved individual may bring a civil action against the agency, and may recover (a) the greater of $1,000 or the individual's actual damages, and (b) reasonable attorney fees and costs. 5 U.S.C. § 552a(g)(1)(D)(4)(A). Plaintiff failed to produce any evidence of injuries of the sort that would sustain an award of damages. Plaintiff did not show actual pecuniary loss in order to bring the claim within the Privacy Act. See Hudson v. Reno, 130 F.3d 1193, 1207 (6th Cir. 1997). Plaintiff produced no evidence of actual damage in the district court.

In the Sixth Circuit a plaintiff may recover actual damages if there is an "intentional or willful violation". Wiley v. Department of Veteran Affairs, 176 F.Supp. 2d 747, 775 (E.D. Mich. 2001); Hudson v. Reno, 130 F.3d 193, 1206-1207 (6th Cir. 1997). To be entitled to recovery under the Act, however, a plaintiff must prove that he or she has suffered "actual damages." Actual damages under the Privacy Act do not include recovery for mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries. Hudson v. Reno, at 1207 (internal quotations and citations omitted). Emotional damages are not recoverable. Wiley v. Department of Veteran Affairs, supra. In Doe v. Chao, 540 U.S. 614, supra, the United States Supreme Court reversed the Fourth Circuit Court of Appeals which held that a Plaintiff could obtain damages for emotional distress on learning of the

improper disclosure of his social security number. The United States Supreme Court held that merely showing intentional or wilful violation of the Act is insufficient. The Plaintiff must have suffered actual damages. Id.

Schmitt is not "a person entitled to recovery." Petitioner did not prove he suffered an adverse action and an injury in district court, but simply asserted a fear of future damages and distress. There is no authority for the proposition that fear of future injury constitutes an adverse effect within the meaning of the act. See generally, Romero-Vargas, supra. Schmitt failed to establish a causal nexus between Defendant's disclosure and some "adverse effect" he suffered. See Quinn v. Stone, 978 F.2d 126, 131 (3d Cir. 1992). In light of the record, the Court's review of the purported conflict between the Sixth and Eleventh Circuits will not make a difference in the result as Petitioner cannot prevail as a matter of law on the facts determined by the district court.

C. Federal Law Bars an Award of Attorneys' Fees to Plaintiff.

There is no authority in the Privacy Act statute for an award of attorneys' fees other than against a federal agency for Petitioner's claim of prospective declaratory relief under § 7 (b). None of the district court cases, which allowed only prospective declaratory relief, awarded attorneys' fees. See, Greidinger v. Davis, 782 F. Supp. 1106 (E.D.Va. 1992), rev'd, 988 F.2d 1344 (4th Cir. 1993) (expressly denying attorneys' fees on Section 7(b) claim).

Declaratory relief does not entitle Petitioner to an award of attorneys' fees. To the contrary, the long established "American rule" is that attorneys' fees cannot be recovered by a litigant absent a contract, an express statutory provision,

misconduct in litigation, or the equivalent of a common fund. See, Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979). None of those exceptions apply in this case. Significantly, Plaintiff should not be entitled to attorney fees when he failed to prove the mandatory element that the City willfully or intentionally violated the Privacy Act. 5 U.S.C. § 552a(g)(1)(D)(4).

II. The City is Authorized by Federal Law to Both Use and Require the Disclosure of Social Security Numbers in the Administration of its Income Tax Law, and Therefore no Real Conflict Between the Eleventh and Sixth Circuits Exists.

An alternative ground for upholding the result of the Sixth Circuit Court of Appeals exists which makes the issue of whether Petitioner has a implied right to sue the City under the Privacy Act of no practical importance in the present case. There are two exceptions to Section 7 of the Privacy Act making it illegal for any federal, state or local agency to deny any individual any right, benefit or privilege solely because an individual refuses to disclose his or her Social Security Number(SSN). Petitioner conveniently ignores the clear language of § 7(2) which states that the provisions of paragraph 7(a)(1) shall not apply with respect to:

> A. Any disclosure which is required by Federal statute,... § 7(2)(A).

In the Tax Reform Act of 1976, Congress enacted a new provision, 42 U.S.C. § 405(c)(2)(C)(i) which amended the Social Security Act, and allowed the use of Social Security Numbers in the administration of any tax within its jurisdiction as a means of identifying individuals on state and local income tax returns. Thus, Petitioner's claim that the City

violated the Privacy Act by requiring the disclosure of his social security number on the City's income tax return is without merit. The Privacy Act of 1974 was implicitly repealed, in part, by the 1976 amendments to the Social Security Act. That amendment allows any State, or political subdivision thereof, to utilize social security numbers for certain categories of state activity. 42 U.S.C. § 405(c)(2)(C)(i) and (v) provide:

> (i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of the individuals affected by such law, and may require any individual who is or appears to be affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security.
>
> . . .
>
> (v) If and to the extent that any provision of Federal law heretofore enacted is inconsistent with the policy set forth in clause (i), such provision shall, on and after the date of enactment of this subparagraph [enacted October 4, 1976], be null, void, and of no effect. . . .

It is clear from a plain reading of this 1976 amendment to the Social Security Act that the City of Detroit, as a political subdivision of the State of Michigan, may, in the administration of it's tax law, "utilize social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of the individuals affected by such law. . . ." Specifically, the City of Detroit may require the disclosure of the social security number for tax collection purposes. While repeals by implication are disfavored, this Court has established an exception to the repeal-by-implication rule. It has been held that where provisions in two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one. See Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936).

Congress could not have intended the oddity of allowing federal, state or local agencies to utilize social security account numbers for the purpose of establishing and verifying the identity of persons in the administration of any tax pursuant to 42 U.S.C. § 405(c)(2)(C)(i), and yet subject them to liability under the general provisions of the Privacy Act for failure to comply with §7(b) of the Privacy Act. The City or any municipal or state agency should not be subject to such an absurd result. This is especially true when the Privacy Act itself recognizes there are exceptions to holding an agency liable when another federal statute authorizes the conduct. If an agency can require disclosure of a SSN for tax collection purposes under federal law, it does not follow or make any sense to hold an agency liable for failure to tell an individual whether the disclosure is mandatory or voluntary.

Federal courts have dismissed challenges to state mandated disclosure of social security numbers in connection with state driver's license laws which like tax laws, are

exempt from the Privacy Act. In Kasler v. Howard, 323 F.Supp. 2d 675 (W.D.N.C. 2003), affirmed 78 Fed. Appx. 231 (4th Cir. 2003), the Fourth Circuit upheld the district court's dismissal of plaintiff's claim that the state requirement that an applicant must provide a SSN as a condition of obtaining a driver's license violates the Privacy Act of 1974. 323 F. Supp. at 678. The district court held that the Tax Reform Act of 1976 expressly exempts state agencies from the requirement of the Privacy Act so long as the required disclosure of a SSN is "for the administration of any... driver's license..." Id. at 679. See Stroianoff v. Commissioner of Motor Vehicle, 107 F.Supp.2d 439 (S.D.N.Y. 2000), affirmed, 12 Fed. Appx. 33, cert denied, 534 U.S. 954, 122 S. Ct. 352, 152 L.Ed.2d 266 (2001), r'hrg denied, 122 S. Ct. 1352 (2002), (Court found that the Social Security Act had preempted Section 7(a) and allowed the state agency, in the limited circumstance of issuing a driver's license, to request and use plaintiffs' Social Security number).

As explained above, even if Petitioner had an implied right of action under the Act, the Social Security Act sanctions the City's conduct. Further, Petitioner does not meet the statutory criteria for recovery and there is no civil damages remedy available against the City, because Plaintiff has failed to meet the threshold elements required under the Act.

III. Under the Facts of this Case There is no Genuine or Material Conflict Between the Sixth and Eleventh Circuits and There is no Private Right of Action Against Respondents under the Privacy Act as the Sixth Circuit Rightly Decided.

There is no basis for revisiting the Sixth Circuit's application of the Privacy Act in light of the statutory language and legislative history in this case. Faced with a record below which makes the case inappropriate for review, coupled with statutory language that states § 7 does not apply because the Social Security Act allows the disclosure of the SSN for tax purposes, this case does not warrant judicial review. The instant case involves the City's request for the disclosure of Petitioner's SSN for verification of identity in the administration of tax collection. Hence, the City falls outside the reach of the Privacy Act pursuant to the 1976 Amendment to the Social Security Act, which permits disclosure of the SSN for tax purposes and "declares that any law contrary to it is void". 42 U.S.C. § 405 (c)(2)(C)(v).

The existence of the exception to § 7(a) makes any purported conflict between the Sixth Circuit and the Eleventh Circuit immaterial. Even assuming arguendo that the Privacy Act was applicable to municipalities, the Petitioner still cannot prevail under the facts of this case. Significantly, Schwier v. Cox, 340 F.3d 1284(11th Cir. 2003), Pet. Apx. E, p. 31a, agrees with this position. The Eleventh Circuit admits that the final version of the Tax Reform Act which amended the Social Security Act, "authorizes States to use SSN only in the administration of any tax....42 U.S.C. § 405 (c)(2)(C)(i) 2003". (Pet Apx. E, p.31a). Schwier v. Cox, supra addressed whether one could be denied the right to vote unless one submitted his social security number. The administration of the right to vote does not fall under the protection of the

Social Security Act as amended by the Tax Reform Act of 1976.

Petitioner settles on a flawed premise and an overly narrow view that Section 7(b) is not subject to the limitation of the text of 5 U.S.C. § 552 a(a)(1), the definition of an agency, which does not apply to state and local agencies. Yet, Petitioner sought damages against the City and its employees under 5 U.S.C. § 552 a(g)(1)(D)(4)(A) which provides a civil damages remedy against an "agency" for certain violations of the Privacy Act. To bring an action under this law, the defendant must be a federal agency. § 552(a)(g)(1). The Privacy Act looks to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(f),(formerly 552e), for the definition of "agency". § 552a(a)(1); Cardamone v. Cohen, 241 F.3d 520, 524 (6th Cir. 2001). 5 U.S.C. § 552(f) provides:

> For purposes of this section, the term "agency" ... includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The City is not a "federal agency" as defined by the Privacy Act. Schmitt v.City of Detroit, supra, 267 F. Supp. 2d 718; Pet. Apx. C, p. 19a-20a.

Petitioner cannot conveniently ignore the fact that it voluntarily dismissed the individual named Respondents. The issue of whether they can be sued, in their individual or official capacity, which they cannot, (see Polochowski v.

Gorris, 714 F.2d 749 (7th Cir 1983); Windsor v. Tennessean, 719 F2d 155, 159 (6th Cir. 1983)), is not before this Court.

Application of the Privacy Act to state and local agencies, would circumvent the intent of Congress that the rights secured by the Privacy Act be enforceable only against federal agencies. Dittman v. State of California, 191 F.3d 1020 (9th Cir. 1999). Thus, the Act does not cover records maintained by units of state or local government. Perez-Santos v. Malave, 23 Fed. Appx. 11 (1st Cir. 2001) (Privacy act applies only to federal government and not state agencies or individuals employed by State); Dittman v. California, 191 F.3d 102, 1026 (9th Cir. 1999) (Privacy Act does not apply to state agencies or individuals); St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1373 (9th Cir. 1981), Polochowski v. Gorris, 714 F.2d 749 (7th Cir. 1983). See also Kasler v. Howard, 323 F. Supp. 2d 675 (W.D.N.C. 2003), aff'd. 78 Fed. Appx. 231 (4th Cir. 2003); Fetzer v. Cambria County, et al., 384 F. Supp. 2d 813 (W.D. Pa. 2005); Stroianoff v. Commissioner of Motor Vehicles, 107 F. Supp. 2d 439, 444 (E.D.N.Y. 2000), aff'd, 12 Fed. Appx. 33; Pritzker v. City of Hudson, 26 F. Supp. 2d 433 (N.D.N.Y. 1998) (privacy protection for records under Privacy Act is not applicable to state or local agencies).

Petitioner misrepresents to this Court that the Sixth Circuit "incorrectly declaimed that other courts have likewise concluded that the Privacy Act applies only to federal agencies". (Pet.'s Brief, p. 11). The case law above indicates clearly that other courts have determined that the Privacy Act applies only to federal agencies. Congress when considering the Privacy Act, specifically limited its scope to federal agencies although the bill as originally introduced was to apply to state authorities. S. Rep. No. 93-1183, 93d Congress 2d Sess reprinted in 1974 U.S. Code Cong. & Admin. News

6916, 6932; Polchowski v. Gorris, 714 F.2d 749, 752 (7th Cir. 1983). The provisions applying to local and state agencies were deleted because of the uncertain effect the provisions would have and because of the insufficient record Congress lacked the necessary information for devising a remedial scheme. 1974 U.S. Code Cong. & Adm. News at 6933-34; Polchowski, supra, 714 F2d at 752.

Petitioner attempts to fashion an argument that would warrant the involvement of the Court by accusing the Sixth Circuit of judicially eliminating the words "state or local government"(Pet. Brief p. 10) and engaging in improper statutory re-construction. The Petitioner's allegations are without merit. The Sixth Circuit attempted to reconcile competing and inherently inconsistent provisions so that both could remain in effect. Schmitt v. City of Detroit, 395 F.3d 327 (6th Cir. 2005); Pet Apx. A, p. 6a. When the court could not reconcile the conflicting provisions, it hesitantly and reluctantly examined the legislative history to ascertain the legislative intent. Id.

While courts are hesitant to look at legislative history, reviewing the Legislative history in light of conflicting language to find reliable interpretive help is permissible. See generally, Doe v. Chao, supra ,540 U.S. 614, 622-623. The review of the history indicates a clearly expressed legislative intent that the Act would not apply to local and state agencies. 1974 U.S. Code Cong. & Adm News 6916, 6932-34.

The Sixth Circuit opinion correctly reviewed the legislative history and held:

> While we are hesitant to rely upon legislative history, n2 in this instance it overwhelmingly supports the view that the Privacy Act applies exclusively to

federal agencies. Not only was § 7(b) of Pub. L. 93-579 included in the notes to *5 U.S.C. § 552a,* so too was §2, the "Congressional Findings and Statement of Purpose," which contains the following finding: "The privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by *Federal* agencies." Pub. L. 93-579, § 2(a)(1), 88 Stat. 1896 (emphasis added). In the same vein, Congress stated, "The purpose of this Act. ... is to provide certain safeguards for an individual against an invasion of personal privacy by requiring *Federal* agencies ... to [*inter alia*] ... be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Pub. L. 93-579 § 2(b) (emphasis added). Furthermore, Senate Report 93-1183, which is dated September 26, 1974, contains the following discussion of the Privacy Act's application to entities beyond the federal government:

> COVERAGE: PRIVATE, STATE AND LOCAL
>
> As reported, the bill applies to Federal personal information systems, whether automated or manual, and to those of State, local and private organizations which are specifically created or substantially altered through grant, contract or agreement with Federal agencies where the agency causes provisions of the act to be applied to such systems or files or relevant portions.
>
> As introduced, S. 3418 applied to all governmental and private organizations which maintained a personal information systems,

> under supervision of a strong regulatory body, with provision for delegating power to State instrumentalities.
>
> The Committee has cut back on the bill's original coverage and ordered the Privacy Commission to make a study of State, local and private data banks and recommend precise application of the Act where needed.

1974 U.S.C.C.A.N. 6916, *6932-6933. At least one court has cited Senate Report 93-1183 in holding that the Privacy Act applies only to federal agencies. *Polchowski,* 714 F.2d at 752. If nothing else, the report indicates that Congress considered a broader application of the statute but held off pending further study. Finally, plaintiff cites us to nothing in the legislative history of the statute that would indicated that Congress viewed the dissemination of social security numbers differently than it did other records. See 1974 U.S.C.C.A.N. 6916, 6943-46 (discussing privacy concerns related to use of social security numbers but recognizing legitimate uses by entities other than the federal government and recommending further study by the Privacy Commission). Pet. Apx. A, p. 7a. (all emphasis in the original).

The 11th Circuit's Schwier opinion would have this Court to ignore the specific definition of the term agency as defined by the Act, which specifies what agencies to which the Act applies. The Schwier decision's tortured reading of the Act asserts that local and state agencies can be subject to the Act in spite of the language of the Act and the legislative history to the contrary. If Congress had intended to authorize actions against local agencies it would have done so explicitly.

When the Sixth Circuit analysis is viewed as a whole, it properly reviewed the statutory language of the Act utilizing sound judicial restraint and interpretation. Petitioner's substantive argument is nothing more than a claim that the Sixth Circuit got it wrong. In fact, weighing the law compels the opposite conclusion. Even if the Sixth Circuit "erred" in the context of this case , it is an insufficient basis on which to grant a petition for a writ of certiorari in light of the fact that in the instant case the City may request disclosure of SSN for tax purposes and in light of the record.

Petitioner cannot assert the violation of a federal right because he admitted he had not been denied any right and because the Social Security Act requires him to disclose his SSN for tax collection purposes. The Supreme Court has pointed out that not all federal statutes create rights remediable by § 1983: "To seek redress through § 1983 ... a plaintiff must assert the violation of a federal *right*, not merely violation of a federal *law*." Blessing v. Freestone, 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed.2d 569 (1997) (emphasis in original). The Privacy Act of 1974 does not clearly and unambiguously create a private right of action against state and local actors or agencies. If Congress wishes to create new rights it must do so in clear and unambiguous terms. Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268, 2278-79, 153 L.Ed.2d 309 (2002).

The Court in Gonzaga also explained that "even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private right, but also a private remedy." Gonzaga, 122 S. Ct. at 2274; Alexander v. Sandoval, 532 U.S. 275, 289, 121 S. Ct. 1511, 149 L.Ed.2d 517 (2001). The Privacy Act language

does not clearly create a private right or remedy against municipalities.

Although the protection afforded by the Privacy Act is broad, its civil remedy provision is far less expansive. Dittman v. State of California, 191 F.3d 1020, 1026 (9th Cir. 1999). The private right of civil action, created by the Privacy Act, is specifically limited to actions against agencies of the United States Government. The statutory language of the Privacy Act does not suggest that Congress created a private right or private remedy against state and municipal agencies. The law and the legislative history negate such a determination. Clearly,the civil remedy provision of the statute does not apply against local and state agencies. Cardamone v. Cohen, 241 F.3d 520, 524 (6th Cir. 2001) (finding that the Privacy Act borrows the definition of "agency" from the Freedom of Information Act, which defines "agency" as a federal agency).

CONCLUSION

For the foregoing reasons, Respondents request that this Honorable Court deny the Petition for Writ of Certiorari .

Respectfully submitted,

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